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No. 04-81

IN THE
# Supreme Court of the United States

BASF CORP.

*Petitioner,*

v.

RONALD PETERSON, *ET AL.*,

*Respondents.*

**On Petition for a Writ of Certiorari to the Supreme Court of Minnesota**

**MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF PETITIONER**

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## MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

The Chamber of Commerce of the United States of America ("Chamber") respectfully requests leave to file the attached brief *amicus curiae* pursuant to Court Rule 37.2. Petitioner has consented to the filing of this brief, but respondents have withheld consent.

The Chamber is the world's largest federation of business organizations and individuals. It represents an underlying membership of more than three million businesses of every size, in every business sector, and from every geographic region of the country. One of its primary missions is to represent the interests of its members by filing *amicus* briefs in cases involving issues of national concern to American business.

The Chamber and its members have a strong interest in this case because the Minnesota courts significantly curtailed freedom of speech by holding that a corporate defendant can be held liable for "consumer fraud," *notwithstanding the truthfulness of its "commercial speech."* This holding is so extreme that it turns *every* corporate utterance into a potential predicate for treble damages, insofar as a jury might find the company's *truthful* speech to be "unconscionable" under an admittedly "amorphous" state consumer protection statute. *See* Pet. App. 20a.

A substantial amount of speech is at jeopardy. If BASF's speech in this case (including a truthful and non-misleading submission to a reputable trade publication and truthful information submitted to a government agency) can be used to support liability under state consumer protection laws, then a great deal of accurate corporate speech will be fair game for "consumer fraud" actions when alleged to be "for the wrong purpose." Pet. 7. For example:

> fast-food companies often encourage children to exercise and stay in school;

energy companies support conservation and efforts to develop alternative fuel sources;

alcoholic beverage manufacturers encourage consumers to drink responsibly;

athletic apparel companies trumpet financial contributions to after-school programs; and

television stations run advertisements that encourage students to read.

Conduct that was once lauded as "good corporate citizenship" could be considered *prima facie* "fraudulent," on the theory that consumers would not heed the corporate speaker's message if they understood that the speech was motivated (at least partially) by profit.

This case represents a particularly egregious example of state consumer protection litigation run amok. Applying a New Jersey statute to BASF's nationwide conduct, the Minnesota courts have punished truthful, non-misleading speech on the basis that it furthered (in the jury's view) an unfair commercial practice. Because speech by corporations is increasingly disseminated nationwide and even worldwide, the decision below would threaten speech around the globe. In light of the Chamber's strong interest in defending its members against this assault on their freedom of speech, the Chamber seeks leave to file this brief as *amicus curiae*.

Respectfully submitted,

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## INTEREST OF *AMICUS CURIAE*

The interest of the *amicus curiae* is described in the foregoing Motion for Leave to File.[1]

## SUMMARY OF ARGUMENT

For years, the Court has sent conflicting signals on the proper definition of "commercial speech." The resulting jurisprudential uncertainty has led the lower courts to take widely diverging approaches in determining when corporate speech is subject to reduced protection under the First Amendment. In this case, the decision below deepens that conflict by treating a breathtakingly broad class of speech as "commercial," thereby deeply menacing our system of free expression. According to Minnesota's courts, commercial speech includes all statements of fact: (i) made by persons engaged in commerce (including all businesses and their public relations firms); (ii) made to an audience including actual or potential purchasers of their products (including readers of a trade journal); and (iii) addressing any matter in which the speaker has some form of commercial interest (including truthful discussion of the illegal, off-label use of pesticides).

Whatever the correct test may be, this surely is not it. From its inception, the "commercial speech" doctrine was designed to *broaden* the First Amendment's reach by granting limited constitutional protection to product advertisements previously held unprotected. But now, the Minnesota courts have treated speech as "commercial" to *restrict* freedom of speech by subjecting speech at the First Amendment's core – including *undeniably true* speech – to the reduced level of protection accorded to "commercial" speech. This makes no sense; at a barebones minimum, such

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1. Pursuant to S. Ct. R. 37.6, the undersigned counsel for the *amicus curiae* states that they alone authored this brief, and no other persons or entities made any monetary contribution to its preparation or submission.

speech must address the attributes of the company's products or services, as opposed to general discussion on topics of public concern in trade journals or reports to government agencies. Otherwise, speech that lies at the core of the First Amendment will be relegated to its periphery.

The Court should also grant *certiorari* to confirm that even if this kind of speech is to be classed as "commercial speech," that label, without more, is not dispositive of the applicable level of constitutional protection. The Court has sent conflicting signals on that issue, and this case presents an excellent vehicle for the Court to address the increasing uncertainty by holding that the "commercial speech" label is not a license for using *truthful* speech as the foundation for a "consumer fraud" action. *See Peterson II*, Pet. App. 49a-50a (holding truthfulness is an affirmative defense to libel charges but *not* to consumer fraud charges).[2]

These are precisely the kinds of issues that the Court sought to resolve in *Nike, Inc. v. Kasky*, 539 U.S. 654, 123 S. Ct. 2554 (2003), before it ultimately dismissed the case as improvidently granted. *See id.* The issues remain just as urgent in the wake of that result, and this case presents a clean vehicle for the Court to address them definitively.

The Court's guidance on these crucial questions is urgent for the entire business community. As matters stand, the lower courts' uncertainty regarding the definition and treatment of commercial speech is chilling speech on important public policy matters that should be encouraged, not discouraged. The *Kasky* case itself illustrates pressing problems that require the Court's immediate intervention. Moreover, the increasingly nationwide and international

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2. The Minnesota Supreme Court refused to review the Court of Appeals' holding that the First Amendment was inapplicable to BASF's speech, making the intermediate appellate court's decision in *Peterson II* the final state court ruling on the issue. The Court of Appeals' decision in *Peterson II* is reprinted at Pet. App. 28a-56a.

scope of corporate speech and consumer class actions means that many corporate speakers are effectively bound by the stultifying laws of the least-protective jurisdiction. The Court's clarifying guidance is needed now.

## ARGUMENT

### I. THE COURT'S GUIDANCE IS NEEDED ON THE DEFINITION OF COMMERCIAL SPEECH.

This case presents an excellent opportunity to address the confusion and division generated by this Court's past pronouncements on the definition of "commercial speech."

#### A. The Court's Precedents Have Generated Substantial Uncertainty Regarding the Definition of "Commercial Speech."

The Court has announced at least three different tests for determining whether speech is "commercial." The Court has "usually defined" commercial speech as "speech that does *no more* than propose a commercial transaction." *United States v. United Foods, Inc.*, 533 U.S. 405, 409 (2001) (emphasis added). At times, however, the Court has announced a more expansive test: that "expression related solely to the economic interests of the speaker and its audience" is commercial. *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 561 (1980). The Court employed yet a third test in *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60 (1983), by considering three factors: whether the communication was an advertisement; whether it referred to a specific product or service; and whether the speaker had an economic motivation for the speech. *See id.* at 66-68. The *Bolger* Court added to the indeterminacy of these precedents by indicating that speech is not necessarily commercial even if all three factors are met, and conversely that speech can be commercial even if all three factors are not met. *See id.* at 66-67 & n.14.

This Court has acknowledged the inconsistency and indeterminacy of these and other precedents:

> [W]e have stated that speech proposing a commercial transaction is entitled to lesser protection than other constitutionally guaranteed expression. We have also suggested that such lesser protection was appropriate for a somewhat larger category of commercial speech – "that is, expression related solely to the economic interests of the speaker and its audience." We did not, however, use that definition in either *Bolger* or in [*Board of Trustees v. Fox*, 492 U.S. 469 (1989)] .... In *Fox*, we described the category even more narrowly, by characterizing the proposal of a commercial transaction as "*the test* for identifying commercial speech."

*City of Cincinnati v. Discovery Network*, 507 U.S. 410, 422-23 (1993) (emphasis original; citations omitted). The Court chose not to resolve this inconsistency, however, because the parties agreed that the speech at issue in that case was commercial. *See id.* at 416.

The ambiguity left in the wake of *Discovery Network* has been exacerbated by subsequent commercial speech cases. For example, the Court accepted as "commercial speech" statements on an attorney's letterhead and business cards identifying the attorney as a certified public accountant and certified financial planner, *see Ibanez v. Florida Dept. of Business and Professional Regulation, Bd. of Accountancy*, 512 U.S. 136, 142 (1994), a statement of alcohol content on the label of a beer bottle, *see Rubin v. Coors Brewing Co.*, 514 U.S. 476, 481-482 (1995), and truthful statements about the retail prices of liquor, *see 44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996). None of these statements fits

comfortably within the definition of "commercial speech" established in *United Foods*, *Central Hudson*, or *Bolger*.

Lower courts and commentators have expressed frustration with this continuing uncertainty, which the Court tried but failed to resolve in *Kasky*. The Second Circuit, for example, has lamented the "doctrinal uncertainties left in the wake of Supreme Court decisions from which the modern commercial speech doctrine has evolved." *Bad Frog Brewery, Inc., v. New York State Liquor Auth.*, 134 F.3d 87, 94 (2d Cir. 1998). Commentators agree that this Court's "attempts to define 'commercial speech'" are "more *ad hoc* than the source of any real guidance." Jean Wegman Burns, *Confused Jurisprudence: False Advertising Under the Lanham Act*, 79 B.U. L. Rev. 807, 831-32 (1999); *see also* Laurence H. Tribe, AMERICAN CONSTITUTIONAL LAW 896 (2d ed. 1988); Robert Post, *The Constitutional Status of Commercial Speech*, 48 U.C.L.A. L. Rev. 1, 5 (2000) (noting the "boundaries" of commercial speech are "quite blurred").

### B. The Lower Appellate Courts Are in Conflict on the Definition of "Commercial Speech."

The indeterminacy of the Court's precedents has inevitably led to a conflict among various federal courts of appeals and state courts of last resort. The Seventh Circuit has concluded that while "[i]t is not for us to proclaim the official demise of the *Central Hudson* test" for commercial speech, "we will not rush to endow that standard with a greater scope than the traditional definition" of "speech which does *no more than propose a commercial transaction*." *Commodity Trend Serv., Inc. v. Commodity Futures Trading Comm'n*, 149 F.3d 679, 684-85 (7th Cir. 1998) (emphasis added). In doing so, the Seventh Circuit, speaking through now-Chief Judge Flaum, expressed concern about "the incredible breadth of the *Central Hudson* test if taken to its literal extremes." *Id.* at 684.

The Ninth Circuit has imposed an especially stringent variant of the *Virginia Pharmacy* test. After determining that this Court's *Discovery Network* decision "cast serious doubt upon [*Bolger*]," the Ninth Circuit concluded that it should limit commercial speech to traditional advertising. *Thomas v. Anchorage Equal Rights Comm'n*, 165 F.3d 692, 710 (9th Cir. 1999). As the court explained its approach, "[t]his simply is not a case of 'I will sell you X at the Y price.' Under *Discovery Network*, that observation alone suffices to classify the expression as non-commercial." *Id.* (quoting *Virginia State Bd. of Pharmacy v. Virginia Citizens Council, Inc.*, 425 U.S. 758, 762 (1976). Although the Ninth Circuit later granted *en banc* review in *Thomas*, the 11-member *en banc* court dismissed the case on ripeness grounds without reaching or commenting on the commercial speech issue. *See Thomas v. Anchorage Equal Rights Comm'n*, 220 F.3d 1134 (9th Cir. 2000) (*en banc*). Thus, Judge O'Scannlain's panel opinion on that issue remains "persuasive authority" in the Ninth Circuit. *See Roe v. Anderson*, 134 F.3d 1400, 1402 (9th Cir. 1998), *aff'd sub nom. Saenz v. Roe*, 526 U.S. 489 (1999).

Perhaps for that reason, at least two subsequent panels of the Ninth Circuit have held speech to be noncommercial under similarly restrictive tests. In *Hoffman v. Capital Cities/ABC, Inc.*, 225 F.3d 1180 (9th Cir. 2001), the court held that the speech at issue was not commercial because it did not appear "*in a traditional advertisement printed merely for the purpose of selling a particular product.*" *Id.* at 1185 (emphasis added). The court further explained that "[t]here are commonsense differences between speech that does no more than propose a commercial transaction and other varieties, and common sense tells us that this is not a simple advertisement." *Id.* at 1185-86 (internal quote and citation omitted). *See also Mattel, Inc. v. MCA Records, Inc.*, 296 F.3d 894, 906 (9th Cir. 2002) ("If speech is not 'purely commercial' – that is, if it does more than propose a

commercial transaction – then it is entitled to full First Amendment protection.").

The Tenth Circuit has also held that "commercial speech is best understood as speech that merely advertises a product or service for business purposes." *Cardtoons, L.C. v. Major League Baseball Players' Ass'n*, 95 F.3d 959, 970 (10th Cir. 1996). Because the speech at issue in *Cardtoons* did not "merely advertise[] a product or service," the Tenth Circuit held that it was not "commercial speech." *Id.*

In contrast to these circuits that have followed variants of the *Virginia Pharmacy* test, other circuits have followed an expansive version of the *Bolger* test. *See, e.g., Procter & Gamble Co. v. Amway*, 242 F.3d 539 (5th Cir. 2001); *Porous Media Corp. v. Pall Corp.*, 173 F.3d 1109 (8th Cir. 1999). In *Procter & Gamble*, one company made statements about a competitor's business operations – specifically, about whether the competitor donated its profits to the Church of Satan – and suggested that consumers boycott the competitor's products for that reason. Under *Bolger*, the Fifth Circuit concluded that this was "commercial speech" if the speaker "acted *substantially* out of economic motivation." 242 F.3d at 552-53 (emphasis in original). The court of appeals reasoned that the second *Bolger* factor was satisfied by references to the competitor's products, and "[t]he first factor – whether the speech is an advertisement – seems to collapse into the third factor," which is the speaker's motivation. *Id.* The Fifth Circuit thereby held that even boycott-related speech, as opposed to traditional product advertising, can be considered commercial speech.

In contrast to the variants of the *Virginia Pharmacy* test applied by the Seventh, Ninth, and Tenth Circuits, and in contrast to the expansive *Bolger* test fashioned by the Fifth Circuit, the Minnesota courts added to the general confusion by ignoring the need for multi-part tests altogether. According to the courts below, every speech-act made by or

on behalf of a company enjoys reduced constitutional protection, at least to the extent that it fails to disclose its profit margins. *See Peterson I*, Pet. App. 62a (plaintiff may claim damages for "consumer fraud" even based on truthful speech if he "lost the opportunity to refuse to buy [the defendant's products] because [he was ignorant] of the large profit [the defendant] would make" on the transaction).

The resulting instability is especially manifest in this case, because the speech that BASF sought to exclude under the First Amendment is not "commercial" under the tests applied by other courts. Clearly BASF's magazine article did not merely "propose a commercial transaction." *Commodity Trend Serv.*, 149 F.3d at 684-85. Indeed, it said nothing resembling "'I will sell you X at the Y price.'" *Thomas*, 165 F.3d at 710. Nor did it constitute "a traditional advertisement." *Hoffman*, 225 F.3d at 1185. It certainly did not "merely advertis[e] a product or service." *Cardtoons*, 95 F.3d at 970. Instead, BASF's public relations firm made general and truthful statements about illegal off-label pesticide use, without mentioning BASF or its products, and without offering any prices or terms of sale. *See* Pet. 6-7.

By holding such speech to be commercial, the Minnesota courts ruled in conflict with the federal circuits that follow variants of the *Virginia Pharmacy* test. Their decision reaches even farther than the Fifth Circuit's application of the *Bolger* test, inasmuch as BASF's article made no mention of its products. Indeed, the lower court's decision in this case reaches even farther than the California Supreme Court's troublesome decision in *Kasky*, which held that speech may be deemed "commercial" solely because of the speaker's economic motivations. *See* 45 P.3d 243 (Cal. 2002), *cert. dismissed*, 123 S. Ct. 2554 (2003). This jurisprudential misunderstanding has persisted long enough; the Court should take this opportunity to forestall further confusion about the proper scope of constitutional protection for speech on such matters of public concern.

### C. The Court Should Address the Speech Issues and Hold that, At a Minimum, Only Speech About the Attributes of Goods or Services for Sale Can Be Considered "Commercial."

This case presents an especially valuable vehicle for addressing the lower courts' confusion about the definition of "commercial speech." While line-drawing in this area may be difficult in some respects, this case turns on an obvious line: only speech advertising the attributes of products or services for sale can be considered "commercial" speech. In contrast, speech that addresses business operations in general, or other matters of public policy or public concern, should be accorded the full First Amendment protections enjoyed by all other participants in those debates.

#### 1. The History of the "Commercial Speech" Doctrine Demonstrates that It Addresses Only the Advertising of Products and Services, Not Corporate Speech Generally.

This line is strongly supported by the history of the "commercial speech" doctrine, which shows that the doctrine was intended to *grant* limited protection to product advertising, not to *limit* the protections already applied to other types of corporate speech. The Court developed the modern "commercial speech" doctrine in the 1970s in response to its earlier holding that "the Constitution imposes *no . . . restraint* on government as respects *purely commercial advertising*." *Valentine v. Chrestensen*, 316 U.S. 52, 54 (1942) (emphasis added). Specifically, the Court gave birth to the doctrine by overruling *Valentine* and holding that "commercial speech, like other varieties, is protected." *Virginia Pharmacy*, 425 U.S. at 760-61.

In doing so, the Court could not have been clearer that by "commercial speech," it was referring only to the narrow kind of product advertisement addressed in *Valentine*:

> [T]he question whether there is a First Amendment exception for "commercial speech" is squarely before us. Our pharmacist does not wish to editorialize on any subject, cultural, philosophical, or political. He does not wish to report any particularly newsworthy fact, or to make generalized observations even about commercial matters. *The "idea" he wishes to communicate is simply this: "I will sell you the X prescription drug at the Y price." Our question, then, is whether this communication is wholly outside the protection of the First Amendment.*

*Id.* at 760-61 (emphasis added). From its genesis, therefore, the "commercial speech" doctrine was designed to address speech that does *not* "editorialize on any subject," "report any particularly newsworthy fact," or "make generalized observations . . . about commercial matters." *Id.* Instead, it was designed to give limited *protection* to speech that does "*no more* than propose a commercial transaction." *Id.* at 761, 762 (internal quotation omitted).

Significantly, the speech at issue here – on public policy matters involving corporations – was fully protected long before the Court extended any protection to "commercial" speech. As early as 1940, the Court held that self-interested speech "concerning the conditions in industry and the causes of labor disputes" is protected by the First Amendment, because it is "indispensable to the effective and intelligent use of the processes of popular government to shape the destiny of modern industrial society." *Thornhill v. Alabama*, 310 U.S. 88, 103 (1940); *see also Thomas v. Collins*, 323 U.S. 516 (1945). Thus, speech about business operations generally – as opposed to product advertising – has always received full First Amendment protection, not the limited protection subsequently devised for "commercial speech."

The Court has never departed from this understanding. To the contrary, the Court has repeatedly recognized that the advertisement of products or services – as opposed to business operations generally – is the *sine quo non* of "commercial speech." Thus, the Court explained in the early years of the "commercial speech" doctrine that such speech "serves to inform the public of the availability, nature, and prices of products and services," *Bates v. State Bar of Arizona*, 433 U.S. 350, 364 (1977), because it "relates to a particular product or service." *Friedman v. Rogers*, 440 U.S. 1, 10 (1979); *see also Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 507 (1981) (referring to "commercial speech" as "commercial price and product advertising"). More recently, the Court confirmed: "The entire commercial speech doctrine . . . represents an accommodation between the right to speak and hear expression about *goods and services* and the right of government to regulate the sales of such *goods and services*." *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 499 (1996) (plurality opinion) (quotation omitted) (emphasis added and omitted).

In keeping with this long-established understanding of the "commercial speech" doctrine, this Court (unlike the Minnesota state courts) has "always been careful to distinguish commercial speech from speech at the First Amendment's core." *Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 623 (1995). For example, the Court has held that while a manufacturer's speech about the attributes of a specific product is "commercial" regardless of whether it is linked to a public debate, *see Bolger*, 463 U.S. at 67-68, an energy company's speech to its customers about energy conservation is not "commercial." *Pacific Gas & Elec. Co. v. Public Utils. Comm'n*, 475 U.S. 1, 8-9 (1986) (plurality opinion). Such speech "extends well beyond speech that proposes a business transaction and includes the kind of discussion of matters of public concern that the First

Amendment both fully protects and implicitly encourages." *Id.* (internal citations and quotations omitted).

**2. BASF's Speech Is Fully Protected.**

Far from advertising its products' attributes, BASF's magazine article in *Sugarbeet Grower* presented truthful discussion about regulatory matters of great importance to its audience – the illegal, off-label use of pesticides on "minor" crops – as did the reports it submitted to government authorities. This is speech at the core of the First Amendment, not the type of "commercial speech" that was excluded altogether from First Amendment protection prior to *Virginia Pharmacy*. *See, e.g., Thornhill*, 310 U.S. at 103.

Indeed, corporations are generally accorded the same free speech rights as other speakers precisely because the First Amendment is designed to protect the public's access to information, and "[t]he inherent worth of . . . speech in terms of its capacity for informing the public does not depend upon the identity of its source." *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 777 (1978). Suppressing speech merely because the speaker is a corporation runs contrary to our "profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide-open." *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964).

This should be an easy case. Instead of making statements connected with the sale of Poast Plus, the article addressed the changing regulatory environment for off-label pesticide use as part of a general debate on matters of public concern. Similarly, the reports simply brought unlawful conduct to the agency's attention. Accordingly, BASF's speech falls well outside the "commercial speech" category.

## II. THE COURT'S GUIDANCE IS NEEDED ON THE TREATMENT OF COMMERCIAL SPEECH.

Even if the Court considered BASF's speech to be "commercial," that should not be the end of the matter. The

Court has sent conflicting signals on whether the "commercial speech" label alone dictates the applicable level of constitutional protection, or whether further analysis is required. The Court should take this opportunity to confirm that this label does not invariably trump all other strands of First Amendment jurisprudence, especially the fundamental prohibition against discrimination among speakers.

### A. The Court Has Sent Conflicting Signals on the Treatment of "Commercial Speech."

In Section I.A, above, the Chamber addressed the conflicting signals that the Court has sent on the definition of "commercial speech." The Court has also "followed an uncertain course" in determining what level of protection to accord speech that has been determined to be "commercial." *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 574 (2001) (Thomas, J., concurring). In some cases, the Court has held that the "mere fact" that speech is commercial "does not in and of itself dictate the constitutional analysis that should apply to decisions to suppress" it. *44 Liquormart*, 517 U.S. at 501; *see also, e.g., Discovery Network*, 507 U.S. at 424 (emphasizing that courts must be careful not to "place too much importance on the distinction between commercial and noncommercial speech"). But in other cases (and especially in older cases), the Court has held the "commercial speech" label dispositive of the level of protection accorded the speech. *See, e.g., Central Hudson*, 447 U.S. at 561-66.

The Court's most recent precedents have only added to the uncertainty. In *United Foods*, this Court noted that precedents which "accord less protection to commercial speech than to other expression" have "been subject to some criticism." 533 U.S. at 409-10 (citing opinions of Stevens and Thomas, JJ.). But the Court concluded that it "need not enter into the controversy" because the restriction at issue in that case could not be upheld under any standard. *Id.* at 410. In *Lorillard*, the Court recognized that a *majority* of the

Justices have criticized *Central Hudson*, but again concluded that the traditional test sufficed for purposes of that case. *See* 533 U.S. at 554-55; *see also id.* at 571 (Kennedy, J., joined by Scalia, J., concurring) (emphasizing that in view of the "obvious overbreadth" of the restriction at issue, the Court was not required *in that case* "to consider whether *Central Hudson* should be retained in light of the substantial objections that can be made to it"); *id.* at 575 (Thomas, J., concurring) ("there is no philosophical or historical basis for asserting that commercial speech is of lower value than noncommercial speech") (internal quotation omitted).

Similarly, in *Thompson v. Western States Medical Center*, 535 U.S. 357 (2002), the Court again noted that "several Members of the Court have expressed doubts about the *Central Hudson* analysis." *Id.* at 367-68. But the Court again declined "to break new ground," in part because "[n]either party . . . challenged the appropriateness of applying the *Central Hudson* framework" in that case. *Id.* at 367. And most recently, in *Nike, Inc. v. Kasky*, the Court declined on procedural grounds to reconsider the "potentially conflicting principles" underlying *Central Hudson*, notwithstanding three Justices' efforts to revisit these issues. *Id.*, 123 S. Ct. at 2565 (Breyer and O'Connor, JJ., dissenting); *see also id.* at 2559 (Kennedy, J., dissenting).

This state of affairs has led to unfortunate results. In *Procter & Gamble*, the Fifth Circuit held that a corporation's speech about a competitor's religious affiliation could be deemed false "commercial speech" entitled to *no* First Amendment protection, even though this speech "touched on the type of issues that are at the heart of First Amendment protections, namely: religious issues and issues of how corporations act and influence society." 242 F.2d at 550. Judge Smith, the author of the court's opinion, went out of his way to emphasize that he questioned this result. *See id.* at 557-59. But he determined that his hands were tied by this Court's controlling precedents. *See id.* at 557-58.

Judge Smith's efforts to grapple with the contours of this Court's jurisprudence are admirable in contrast with the cursory – and astoundingly fallacious – approach adopted by the Minnesota courts below. Instead of considering the complexities of these precedents, the court in *Peterson II* concluded that the First Amendment provides *absolutely no* protection for a company's speech in a "consumer fraud" case, even on an issue of acknowledged public concern. The reasoning for this conclusion was no more than tautological definition: the First Amendment does not apply, the court said, simply because "this is a consumer fraud action, not a defamation action." *Peterson II*, Pet. App. 50a; *see also id.* at 49a-50a ("Here, there is no claim that the reports that BASF seeks to protect were defamatory . . . . This consumer fraud action, however, does not raise a libel claim."). To support this incredibly skimpy analysis, the court cited only its prior decision in a patent case. This Court, by contrast, rejected this very approach of "censorship by classification" in cases such as *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988) (applying constitutional "actual malice" standard to tort action for emotional distress), and *Time, Inc. v. Hill*, 385 U.S. 374 (1967) (same in tort action for invasion of privacy). The urgent need for the Court's guidance on the free speech issues presented here – that are now being raised in consumer protection actions brought as class actions on behalf of many individual plaintiffs – could not be more apparent. *See, e.g., Kasky*, 539 U.S. 654, 123 S. Ct. at 2568 (Breyer, J., dissenting) ("refusal immediately to review the state-court decision before us will 'seriously erode' the federal constitutional policy in favor of free speech" and "may well 'chill' the exercise of free speech rights").

### B. The Court Should Take the Opportunity to Hold that the "Commercial Speech" Label Alone Does Not Fix the Level of Constitutional Protection.

This case provides an important opportunity to address the proper treatment of commercial speech. Although no

comprehensive reassessment of *Central Hudson* is required to decide this case, the Court would foster the fundamental values underlying freedom of speech by confirming that each speaker on matters of public concern is to be treated equally under the law, regardless of whether the speaker is deemed to be engaging in "commercial" speech. This is familiar jurisprudential terrain; a neutrality principle has long been embedded in the Court's First Amendment jurisprudence. *See, e.g., R.A.V. v. St. Paul*, 505 U.S. 377, 392 (1992). Thus, it is now a commonplace that the government may not discriminate among speakers by "licens[ing] one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensberry rules." *Id.*

Yet that is precisely the result ordained by the Minnesota courts here, when they concluded that the First Amendment has *no* place in a "consumer fraud" action. Therefore, the Court should take this opportunity to hold that even if a corporation's speech on a public policy matter is deemed to be "commercial speech," it cannot be punished without the same showing of fault (be it negligence or actual malice) that is required in an action brought against any other participant in the public debate (such as a defamation suit brought by the corporation). *Cf. Kasky*, 539 U.S. 654, 123 S. Ct. at 2567 (Breyer, J., dissenting) (such laws create "concern that the commercial speaker engaging in public debate suffers a handicap that noncommercial opponents do not").

A contrary conclusion would leave First Amendment freedoms hanging by too slender a thread. In this case, the *Sugarbeet Grower* article was plainly not "commercial" because it did not address the attributes of goods or services that BASF offered for sale. But typically, the determination whether speech is "commercial" turns on "a matter of degree," as the Court has noted. *Discovery Network*, 507 U.S. at 423. Indeed, Justice Thomas has expressed "doubt whether it is even possible to draw a coherent distinction between commercial and noncommercial speech." *Lorillard*,

533 U.S. at 575 (Thomas, J., concurring); *see also Rubin v. Coors Brewing Co.*, 514 U.S. 476, 494 (1995) (Stevens, J., concurring) (commenting on the "artificiality of a rigid commercial/non-commercial distinction"); Alex Kozinski & Stuart Banner, *Who's Afraid of Commercial Speech?*, 76 Va. L. Rev. 627, 628 (1990) ("the commercial/noncommercial distinction makes no sense").

Under the holding in *Peterson II*, however, a distinction that often rests on a minor difference in degree is transformed into a major difference in kind. If BASF's speech is not commercial, then it is entitled to full First Amendment protection. But if it *is* commercial, then it is entitled to *no* protection, at least when it is challenged in a "consumer fraud" action. Especially given the tenuousness of the distinction between commercial and noncommercial speech, and the enormity of the stakes in "consumer fraud" cases, this sharp disparity in treatment makes little sense. As one court has pointedly noted, "using the mere identification of commercial speech as the analytic tool [would] operate with a meat cleaver instead of a scalpel, and would amputate much of the core of protected speech from the body of the First Amendment." *National Life Ins. Co. v. Phillips Publ'g, Inc.*, 793 F. Supp. 627, 646 (D. Md. 1992). The Court tried to address these free speech issues last term, but ultimately left them unresolved. *See Kasky*, 539 U.S. 654, 123 S. Ct. at 2558 (Stevens, J., concurring) ("This case presents novel First Amendment questions because the speech at issue represents a blending of commercial speech, noncommercial speech and debate on an issue of public importance.").

Of course, the simplest way to resolve this case would be to hold that BASF's speech was not "commercial." But if this Court were to hold that the speech at issue was commercial, then it should also hold that the status of this speech as "commercial" speech is not dispositive of the level of constitutional protection that should be afforded. Instead, the bedrock neutrality principle dictates that however

BASF's speech is labeled, it must be treated the same as all other speech that occurs in the course of the same public policy debate. *See, e.g., id.* at 2559 (Stevens, J., concurring) ("The interest in protecting such participants from the chilling effect of the prospect of expensive litigation is therefore also a matter of great importance.").

## III. THE COURT'S REVIEW IS NEEDED TO PREVENT IMMEDIATE AND NATIONWIDE SUPPRESSION OF SPEECH ON IMPORTANT PUBLIC POLICY MATTERS.

The Court's plenary review in this case is needed to prevent immediate harm. The confusion spawned by the Court's "commercial speech" precedents makes it extremely difficult for corporate counsel to determine which statements are fully protected and which are not. Such uncertainty can only "inhibit the exercise of [First Amendment] freedoms" by "lead[ing] citizens to steer far wider of the unlawful zone . . . than if the boundaries were clearly marked." *Grayned v. City of Rockford*, 408 U.S. 104, 109 (1972) (quotation omitted). The inconclusive result last Term in *Kasky* merely underscores the immediacy of these problems. *See, e.g., Kasky*, 539 U.S. 654, 123 S. Ct. at 2560 (Breyer, J., dissenting) ("delay itself may inhibit the exercise of constitutionally protected rights of free speech without making the issue significantly easier to decide later on").

The decision below heightens the need to clarify the proper boundaries of the Court's free speech doctrines. The increasingly nationwide nature of corporate speech means that the law of the least-protective jurisdiction effectively governs statements made by corporations everywhere. If one jurisdiction can punish this kind of speech in a consumer class action, then as a practical matter, speakers nationwide will be prevented from disseminating such speech at all.

The upshot of the ruling below is that *most* corporate speech can be classified as "commercial" speech, including

all statements of fact: (i) made by persons engaged in commerce (including all businesses); (ii) made to an audience that includes actual or potential purchasers or users of their products; and (iii) addressed to any matter in which the speaker has a commercial interest (including a trade journal article or government report), even if that speech is focused on a public policy matter of obvious public concern.

As a result, companies now face the unhappy choice of either remaining quiet on important public policy debates concerning their own operations, or facing liability for any statements made in the context of heated and fast-moving debate, simply because they have a commercial interest in the issues being debated. The risks of being sued and found liable are far from trivial, since many state consumer protection laws have relaxed the constraints on traditional fraud actions – such as proof of *scienter* and reliance.

This regime cannot be squared with bedrock principles of free speech. The decision below forces responsible corporate citizens to curtail their involvement in public debate, lest they risk a consumer fraud lawsuit premised on "impure" corporate motivations. For example:

> fast-food companies often encourage children to exercise and stay in school;
>
> energy companies support conservation and efforts to develop alternative fuel sources;
>
> alcoholic beverage manufacturers encourage consumers to drink responsibly;
>
> athletic apparel companies trumpet financial contributions to after-school programs; and
>
> entertainment companies run advertisements that encourage students to read.

Under the rulings below, these types of speech create potential liability and are punishable by an award of treble

damages. Yet in each instance, a corporate speaker addresses the American public (including its customers) on matters involving the effects of its own business operations, which are also matters of public concern. And in each instance, a plaintiff might sue under state consumer protection laws) based on even *truthful statements* made by the company in public policy debates. Thus, if the Court were to deny *certiorari*, then companies nationwide (and even worldwide) could only speak on matters of great public concern if they were willing to risk a civil judgment against them based on such expansive application of state consumer fraud laws. The regime envisioned is utterly inhospitable to free speech in disregard of the Constitution. *See, e.g., Kasky*, 539 U.S. 654, 123 S. Ct. at 2568 (Breyer, J., dissenting) ("refusal immediately to review the state-court decision before us will 'seriously erode' the federal constitutional policy in favor of free speech" and "may well 'chill' the exercise of free speech rights"). This Court alone can and should make that dominant fact clear to all concerned.

## CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of *certiorari*.

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